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IN THE

# Supreme Court of The United States

~~1971~~ 70-190

POP POPPENHEIMER ET AL
PLAINTIFF-PETITIONER

V.

CITY OF MEMPHIS AND SHELBY COUNTY
QUARTERLY COURT AND COMMISSIONERS
DEFENDANT-RESPONDENT

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## PETITION FOR WRIT OF CERTIORARI

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W. SLATER HOLLIS
Counsel for Petitioners
P. O. Box 80876
Memphis, Tenn. 38111

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## PETITION

## TO THE HONORABLES CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

A. This is a Petition to the United States Supreme Court for a Writ of Certiorari to review the Opinion and Decree of the State of Tennessee Supreme Court.
B. The grounds on which the jurisdiction of the United States Supreme Court is invoked are:

This is a civil voting rights suit for an injunction originally brought in a Chancery Court of the State of Tennessee to redress the denial and abridgment of constitutional voting rights. An injunction was denied.

The Supreme Court of the State of Tennessee, on direct appeal, affirmed in an Opinion and Decree filed and entered on 4 January 1971 and 27 February 1971, respectively.

A Petition to Re-Hear was filed and the State Supreme Court, supra, denied same by an order filed 1 March 1971.

This is a Petition for a Writ of Certiorari based upon 28 U. S. C. 1257 to review the Opinion and Decree of the Supreme Court of the State of Tennessee.

C. The questions presented in this case are:

1. The first procedural question presented is: When the Tennessee Supreme Court sanctioned, by its Opinion and Decree, the Chancery Court's having advised the party Defendant in a Memorandum Opinion on a non-final "continued" Hearing of the step it should take to obtain a decision over the party Plaintiff, did this Advisory Opinion infringe upon Plaintiffs' rights under the United States Constitution?

2. The second procedural question presented is: When the Tennessee Supreme Court sanctioned, by its Opinion and Decree, the lower Court's appointment of a regular, continuing attorney employee of the party Defendant as Amicus Curiae to counsel the Chancery Court, did the Chancery Court's appointment infringe upon Plaintiffs' rights under the United States Constitution?

3. The third procedural question presented is: When the Tennessee Supreme Court sanctioned, by its Opinion and Decree, supra, the appointment of the employee attorney of the party Defendant as Amicus Curiae, supra, did the attorney's concealment of his relationship with the party Defendant infringe upon Plaintiffs' rights under the United States Constitution?

4. The fourth procedural question presented is: When the Tennessee Supreme Court has pending before it, among other, the third procedural question, supra, was the public consort of a judge of that Court who was seeking re-election with the attorney whose conduct was pending before the Court on which the judge was sitting questionable conduct leading to inference of possible infringement on Plaintiffs' rights under the United States Constitution?

5. The substantive question presented is: When the Tennessee Supreme Court, by its Opinion and Decree, held a State Legislative Act supreme over

the State Constitution—thereby denying the Plaintiffs their civil voting rights, infra—did this holding infringe upon Plaintiffs' rights to a republican form of government in a free and democratic society under the United States Constitution?

The People of Tennessee, in their State Constitution, reserved to themselves the right to vote as follows:

> "The General Assembly **MAY** provide for the consolidation of **any or all** of the governmental and corporate functions now or hereafter vested in municipal corporations with the governmental and corporate functions now or hereafter vested in the counties in which such municipal corporations are located; provided, **such consolidations SHALL NOT become effective until submitted to the qualified voters residing within the municipal corporation and in the county outside thereof, and approved** by a majority of those voting within the municipal corporation and by a majority of those voting in the county outside the municipal corporation." (emphasis supplied). **Tennessee Constitution,** Art. XI, Sec. 9, Par. 9. (the Eighth Amendment) (1953).

The Court, denying the People the right to vote, stated:

"Chapter 413, Private Acts of 1933[1] . . . is an enabling Act which authorizes Shelby County and all municipalities therein to consolidate or operate jointly[2] **any or all** governmental or corporate activities or functions of the county and municipal corporations." Appendix I.

The Court concludes, therefore, that the Constitutional mandate, supra, must give way to the Legislative mandate:

[1]Chapter 413 of the Private Acts of 1933 provides, in the parts relevant to this case:

> "That **Shelby County and/or municipal corporations** and/or other local governmental agencies located in said County be, and are hereby authorized and empowered to consolidate or operate jointly **any or all governmental or corporate activities or functions** of said County and/or municipal corporations and/or other local governmental agencies located therein which may now or hereafter be authorized to operate or conduct, which may be conveniently or advantageously consolidated or operated jointly." **Chapter 413 of the Private Acts of 1933, Section 1.**
>
> "That for the purpose of carrying out the powers and authorities granted by this Act, said **Shelby County and/or all municipal corporations** and/or other local governmental agencies located therein, be, and **are hereby expressly authorized and empowered to enter into contracts for the purpose of carrying out any such consolidations** and/or joint operations of governmental or corporate activities or functions authorized by this Act." **Ibid, Section 2.**

[2]". . . operate jointly . . . ." is not an issue in this case.

"We conclude, as did the Chancellor, the Eighth Amendment to Article 11, Section 9, of the Constitution cannot have any application to the **contract** consolidating the hospitals of the City and County."[3], [4].

Therefore, the sine qua non question is: Has the State Supreme Court exceeded its constitutional powers when, by interpretative device, it holds a State Constitutional provision to be "not self-executing" until and unless the State Legislature it purports to control decides to have itself controlled by said Constitutional provision; that is to say, does a State Supreme Court have the power to remove the reins that the People have placed on the State Legislature and, simultaneously, by this very removal, does the State Supreme Court have the power to remove the reins that the People have placed on the State Supreme Court itself.[5] If yes, this describes a republi-

[3]Plaintiffs wish to be clear that the issue in this case is **not** 'consolidation in whole or in part versus no consolidation in whole or in part' but, instead, **'the People's reservation to themselves of the right to vote on** consolidation in whole or in part versus no consolidation in whole or in part'.

[4]The operation of the hospitals is the third largest financial, and the second largest operational, function of the government of the City of Memphis, Tennessee. Financially, the hospital function follows the school and police-fire function, but it still accounts for the equivalent of approximately one-third of the tax rate. Operationally, the hospital function follows only the police and fire function, since the school function is autonomous under a separate school board.

[5]"He (the King) has combined with others . . . for . . . altering fundamentally the **forms** of our government." (parenthesis and emphasis supplied). Thomas Jefferson, **The Declaration of Independence**.

can form of government in a free and democratic **society and the People were properly denied their right to vote on the form** — consolidated or unconsolidated, in whole or in part — of their government.

If no, rights under the U. S. Constitution have been felled by the Tennessee Supreme Court.

D. The Constitutional Provisions which this case involves are:

"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." **United States Constitution, Art. IV, Sec. 4.**

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." **United States Constitution, Amendment XIV, Sec. 1.**

E. The facts material to the questions presented, supra, are:

1. On 27 June 1969, Plaintiffs filed their Original Bill seeking an Injunction against the **consolidation by contract between governing officials of the hospital functions and facilities** of the City of Memphis and the County of Shelby, Tennessee, which was to be commenced on 1 July 1969, on the grounds that the Tennessee Constitution, Art. XI, Sec. 9, Par. 9, supra, (hereinafter referred to as Amendment 8), requires that consolidations of **any or all** governmental functions and facilities be with the consent of the people by vote in an election. (Tr. 2-4)

2. On 1 July 1969, Defendants City and County filed Motions to Dismiss the Complainants' Original Bill on the ground that Amendment 8 does not apply to consolidations of **one** function of government and that, among other, Chapter 413 of the Private Acts of 1933, supra, was authority for their consolidation of **one** function. (Tr. 12-18)

3. On 1 July 1969, the Court held a hearing on said Bill for Injunction and Motion To Dismiss and, after hearing argument, the Court: (1) continued said hearing on the ground that the 12 May 1969 contract of consolidation was not clear vis a vis affirmations that it was clear, and on the ground that the contract was not final vis a vis the fact that the 12 May 1969 contract had been signed by all De-

fendants and vis a vis the fact that it had already been ratified by the legislative bodies of the Defendant City and County as a matter of existing public record (which affirmations of clarity and facts of finality were subsequently confirmed by the Defendants' continued stand and the court's decision on the identical contract) (2) gave the Defendants 2 months and 22 days to "clarify" and "finalize" the contract and (3) set the continued hearing of the Motion To Dismiss for 22 September 1969. (Tr. 19-21)

4. On 2 July 1969, Plaintiffs' counsel—who was out-of-town — received notice by telephone of the publicly announced intention of the Defendants to proceed with consolidation without waiting for the continued hearing on 22 September 1969 and Plaintiffs' counsel telephoned the Court for a hearing thereon. The Court granted said hearing immediately and, shortly thereafter, the Court and counsel for all parties assembled in the Court's chambers where counsel for Plaintiffs (having returned immediately to the City) was handed a copy of the Court's Memorandum Opinion by counsel for Defendants, read it, and immediately objected to the Court that it had rendered an advisory opinion, and that it had rendered it on a "continued" hearing. The Court rose, stated that I should make it an issue on appeal,[6] and

[6]Counsel for Plaintiff could find no basis in Tennessee law for an appeal of an Opinion rendered on a "continued" Hearing.

left its chambers. (This hearing does not appear of record, but counsel, as officers of the Court, will affirm it.)

5. On 7 July 1969 and 18 September 1969, Plaintiffs filed Amended and Supplemental Bills alleging, among other grounds, that not only was the Eighth Amendment to the Tennessee Constitution violated, but that the 14th Amendment to the United States Constitution was also violated by the Defendants planned consolidation, to all of which Defendants filed Motions to Dismiss. (Tr. 26-44)

6. On 11 September 1969, the Chancery Court appointed three Amici Curiae. (Tr. 54)

7. On 22 September 1969, the continued hearing on Defendants' Motions To Dismiss was held and the Defendants presented the identical contract they had presented to the Court on 1 July 1969. The Court, after hearing argument, took the case under advisement, and, subsequently in its opinion upheld Defendants' Motions To Dismiss, and dismissed Complainants' Bills. (Tr. 59-65)

8. On 25 November 1969, Complainants having prayed an appeal, the Court granted same in its written Decree, entered on 25 November 1969. (Tr. 66-69)

9. On 15 January 1970, **The Memphis (Tennessee)**

**Press-Scimitar,** a local newspaper, revealed Mr. Thomas R. Prewitt—who had been appointed by the Chancery Court as one of Amici Curiae, **supra,** and who accepted the appointment and served — as an employee of the Defendant City of Memphis, Tennessee, which relationship—until this incidental matter appeared in the newspaper — was unknown to Plaintiffs.[7] See **Appendix IV, infra** (An Exhibit to Plaintiffs' **Assignments of Error, infra**) **Cf.** Professional Canon 29.

10. On 17 March 1970, Plaintiffs-Petitioners filed their Assignments of Error (1) objecting to the appointment by the Court of Mr. Thomas R. Prewitt as one of Amici Curiae, (2) objecting to the acceptance of the appointment and service by Mr. Thomas R. Prewitt as said Amicus Curiae without his disclosing all the circumstances of the relationship of his being a regularly employed attorney of the Defendants, (3) objecting to the denial by the Court of the constitutional voting right of the people to determine the consolidation or non-consolidation of their government whether in whole or in part; which objections were based upon, among other, the infringement of the Plaintiffs' rights under the Eighth

[7]Since this information was received on 15 January 1970, and since this was more than 30 days after the entry of judgment on 25 November 1969, jurisdiction had gone out of the Chancery Court into the Supreme Court; accordingly, the proper Court for pleadings was then, not the Chancery Court, but the Supreme Court. **Tennessee Code Annotated 27-301, 312.**

Amendment to the Tennessee Constitution and the 14th Amendment to the United States Constitution and which objections constitute the basis of the first, second, and third procedural questions of the case at bar, **supra.**

## PLAINTIFFS' ASSIGNMENT OF ERRORS

11. On 1 April 1970, Defendants-Respondents filed a Motion to Strike Assignment of Error Number IV —relating to numbers 10(1), 10(2), and 10(3), **supra** —on the ground that "Petitioners on page 38 of their Assignment of Error and Brief admit that no objection was made during the trial of the matter. The records containing the pleadings were absolutely void of any references to either the appointment or the qualifications of the three prominent attorneys appointed by the Court as Amici Curiae." Subsequently, Defendants-Respondents filed their reply to the other Assignments of Error; **viz.** Numbers I, II, III and V.

12. On 28 April 1970, Plaintiffs filed their Rebuttal and the case was at issue before the Supreme Court of the State of Tennessee.

13. On 15 July 1970, **The Memphis (Tennessee) Commercial Appeal,** a local newspaper, publicized that Judge George McCanless of the Supreme Court of the State of Tennessee was being accompanied by Attorney Thomas R. Prewitt in his re-election cam-

paign in Memphis, Tennessee; the same Attorney Prewitt whose acceptance of the appointment of and service in the function of Amicus Curiae was at issue before the Court on which the Judge McCanless was sitting. See **Appendix V, infra.**

14. On 10 November 1970, Hearing was had on the Appeal simultaneous with the Motion to Strike, supra.

15. On 4 January 1971, The Tennessee Supreme Court issued its Opinion (followed by the filing of its Final Decree incorporating the Opinion on 27 February 1971) on the case at bar which included or failed to include, as applicable:

(1) the Court's ignoring altogether the discussion of the advisory opinion on the continued hearing which Plaintiffs had placed in issue before the Court in their Assignment of Error Number IV., C., 2.;

(2) the Court's stating "The assignment challenges the right of the Chancellor to appoint Amicus Curiae. No objection to this action of the Chancellor appears in the record";

(3) the Court's stating, "The Amendment (Amendment 8 of the Tennessee Constitution) is not self-executing . . . .". See **Appendices I and II, infra.**

16. On 13 January 1971, Plaintiffs filed their Petition to Re-Hear which included, among other:

(1) the Plaintiffs' stating **in re** 15 (1), **supra,** that the Court had ignored serious argument of counsel in violation of Judicial Canon Number 19 as well as Amendment 14 of the United States Constitution;

(2) the Plaintiffs' stating **in re** 15 (2), **supra,** ". . . not that the Chancellor had no right to appoint Amicus Curiae, but that he had no right to appoint 'an employee of a party Defendant' as Amicus Curiae . . .".

(3) the Plaintiffs' stating **in re** 15 (3), supra, that "The first Clause of the Eighth Amendment is not self-executing, but the second Clause of the Eighth Amendment is self-executing" and, accordingly, ". . . the Court's statement that 'The (Eighth) Amendment is not self-executing. . . .', **Opinion,** p. 5, is erroneous"; that the Court had erred ". . . by not considering anywhere the history of the 8th Amendment, by not considering anywhere the Constitutional Convention Delegate's expressions, grammar, and definitions on the 8th Amendment. . . ."; that "The effect of the Court's Opinion is to make the creature greater than the creator, **Daughtery v. State,** 159 Tenn. 573 at 575, to make the legislature and the judiciary superior to the Constitution. . . ."; and that this is ". . . the allocation of political powers within a State. . . ." that constitutes a denial of Plaintiffs'

rights to a republican form of government, **Baker v. Carr,** 369 U. S. 186 at 226, and to due process under the State and Federal Constitutions.

The Petition to Re-Hear objected, in sum, not only to the denial of the Plaintiffs' rights under Amendment 14 to the United States Constitution as per 10 (1), 10 (2), and 10 (3), **supra,** but also to the denial of Plaintiffs' rights under Art. IV, Sec. 4, of the United States Constitution as per 16 (3), **supra,** which is the substantive question of this case, **supra.**

17. On 1 March 1971, the Court filed its Order On Petition To Re-Hear denying Plaintiffs' Petition to Re-Hear. See **Appendix III, infra.**

18. This Petition for Writ of Certiorari includes the objection, not raised heretofore, of the questionable conduct of the Judge and Attorney in number 13, **supra**—the Judge not recusing himself from the Opinion and Decree of the Court in this case—which is the fourth procedural question, **supra.**

THIS PETITION, NOW BEFORE THE COURT, FOR WRIT OF CERTIORARI TO REVIEW THE OPINION AND DECREE OF THE STATE OF TENNESSEE SUPREME COURT THAT DISMISSED PLAINTIFFS' BILL FOR INJUNCTION is based upon the errors of law hereinbefore, and hereinafter, set forth.

F. The argument for granting this Petition is based upon the following:

**General**

Plaintiffs ask, among other, that the Court decide a question of substance that has not heretofore been determined by the Court as a federal question ratio deciendi.

The structure of the government of the State of Tennessee has been reviewed before in an Opinion emanating from this Court, and it was found, among other, that "The people have been rebuffed at the hands of Assembly; they have tried the constitutional convention route, but since the call must originate in the Assembly it, too, has been fruitless. They have tried the Tennessee courts with the same result. . . .", **Baker v. Carr**, 369 U. S. 186 at 259 (1962)

The basic structure remains.

In fact, the people are more stymied here than in **Baker v. Carr**—since, in this case, the People **did** reach the Constitutional Convention; however, the State Courts, a part of the same environment discussed in **Baker v. Carr, supra,** have now taken the **one** control the people have over their government—the right to vote — from their hands vis a vis the State Constitution's having placed it there.

The People of Tennessee in general — and the

People of Memphis and Shelby County in this particular case — have exhausted all other possible remedies and now have no recourse unless the Supreme Court of the United States will hear our plea.

What can be so wrong with the People voting on the form of government they wish?

This is all that is asked in this case . . . . . the right to vote that the People gave themselves in their own State Constitution in 1953.

But this right has been taken away, in the miasma of the political arena, by the judiciary in its lone interpretation, without citation of authority, of a State Constitutional provision's "shall not" clause to be "not self-executing."

Memphis and Shelby County, Tennessee—perhaps more than any other community — has known boss rule. Then, the right to vote was controlled by the political boss. The people of Tennessee—having finally thrown off the yoke and to secure their freedom—wrote into the Tennessee Constitution in 1953 that they were, henceforth, to have a right to vote on the form of their government and now, just as they had come to believe that they had achieved the right to vote, they find that that right has been taken away from them by the judiciary. Are the people to be returned, under the battered banner of Justice, to their former state by the last repository of Justice?

If this is truly a democracy, can it remain such unless there is an independent judiciary? Cf. Judicial Canon 14. Can it be an independent judiciary that resorts to such strained construction of the Constitution to deprive the people of the most precious of their rights—" . . . because preservative of all rights."**Yick Wo v. Hopkins,** 118 U. S. 356 at 370 (1886)—and this in contemporary times?

This Court has said "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized", **Reynolds v. Sims,** 377 U. S. 533 (1964).

We ask simply that the Court "carefully and meticulously scrutinize" what has happened here in Tennessee.

Democracy presupposes government by the people. How can there be government by the people if the vote is taken from them?

There are those who say, 'Seek your redress in the electoral process.' "But is this practicable . . . when the wrong complained of is the corruption of the electoral process?" **72 Yale L. J. 13 at 14.**

If it is true, as we believe, that ". . . the right to vote is inherent in the republican form of govern-

ment envisaged by Article 4, Sec. 4, of the Constitution," **Baker v. Carr,** 369 U. S. 186 at 242, do we have a republican form of government in Tennessee when interests can bring about the consolidation of government on a piecemeal basis without determining the Will of the people?

If the Court in this case had, as the Judicial Canons say must be done, applied general law, the people would still have their freedom to vote. But the Court disregarded the whole body of Tennessee Constitutional law that holds explicitly that the Clause in question—a "shall not" clause—**is** "self-executing" and, rather than to attempt to distinguish what is indistinguishable, chose to simply ignore its compelling mandate.

What of the merit or lack of merit of the case? First, the procedural? Second, the substantive?

(1) Is the Memorandum Opinion of 2 July 1969 an Advisory Opinion and if so, was it lawful? Defendant Shelby County did not chose to counter Plaintiffs' allegation. Defendant City of Memphis stated ". . . irrespective of the language used in the memorandum opinion, the record indicated that the Defendants did not alter the contract but proceeded with the execution thereof. Thus, whatever is the objective of raising such an issue, it is certainly a moot question by virtue of the action of the Defendants as set out aforesaid." **Reply Brief of Defendant**

**City of Memphis,** p. 11. In sum, neither Defendant denies Plaintiffs' allegation that it is an advisory opinion and given this, Tennessee law is explicit in declaring it unlawful. **Leighton v. Henderson,** 220 Tennessee 91 at 94-96, and **State ex rel Lewis v. State,** 208 Tenn. 534 at 537. See also **T.C.A. 17-104.** Yet, the Tennessee Supreme Court sanctioned the illegal action of the lower Court. Is this a republican form of government observing due process, equal protection, equal privileges and immunities?

(2) Is it lawful for a judge or chancellor to appoint as Amicus Curiae to ". . . assist and advise the court . . .' and to ". . . ."counsel the Court, a regular, continuing employee of a party Defendant? **Order Appointing Amicus Curia, 11 Sept. 1969 and Decree, 25 Nov. 1969.** Defendants responded "Petitions on page 38 of their Assignment of Error and Brief admit that no objection was made during the trial of the matter. The records containing the pleadings were absolutely void of any references to either the appointment or the qualifications of the three prominent attorneys appointed by the Court as Amici Curiae." **Defendants Motion To Strike Assignment of Error. No. IV.** Plaintiffs did admit, and do admit now, that they did not object on trial to an employee of Defendant being one of Amici Curiae. The reason; Plaintiffs didn't know it. As soon as Plaintiffs did know it (15 January 1970, **Press-Scimitar, supra,**) they made it a matter of record by

making proper and timely objection thereto to the proper court of jurisdiction (the Tennessee Supreme Court) in proper pleadings (Assignments of Error). **T.C.A. 27-301 and 312.** Defendants are honest, but mistaken in their statement in their 30 March 1970 Motion to Strike about the record not referring to the Amici Curiae; which record they themselves cite in their later Reply Brief, p. 4, as follows: "Pending the hearing of the cause, the learned Chancellor appointed the Honorables . . . Thomas R. Prewitt, Esquire . . Amicus Curiae to the Court (Record Page 54)." In sum, Defendants admit it is a matter of record and themselves cite the page thereof and, given this, the Judicial Canons and the existing law are explicit in declaring it unlawful. **Judicial Canons 12 and 34** and **Walker v. Edmonds,** 298 S. W. 610 at 612; **Broome v. Smith,** 265 S. W. (2d) 897 at 899. **In re Oldhauser's Estate,** 101 N. W. (2d) 827 at 829. See, in accord, C. J. S., **Amicus Curiae,** Sec. 2.c., p. 1047. Yet, the Tennessee Supreme Court stated simply "No objection to this action of the Chancellor appears in the record," **Opinion,** p. 8, vis a vis the Plaintiffs having no knowledge thereof at the time of trial so that objection could be made. Is this a republican form of government observing due process, equal protection, equal privileges and immunities?

(3) Is it lawful for an attorney to accept an appointment and to serve as Amicus Curiae in a case

in which he is regularly and continuingly employed by one of the parties without disclosing this relationship to all parties? Defendants answered, not by denial of this fact, but by their response in number (2) immediately above. Plaintiffs objected as soon as they knew of the relationship (15 January 1970, **supra**) at the next filed pleading (the Assignment of Errors) to the court of jurisdiction (the Supreme Court) in accordance with Tennessee law. **T. C. A. 27-301 and 312.** Given this, the Professional Canons are explicit in declaring this unlawful. **Professional Canon 6.** Yet the Tennessee Supreme Court stated "No objection to this action of Chancellor appears in the record," **Opinion,** p. 8, and sanctioned the unethical action of the attorney. **Cf. Judicial Canon 11.** Is this a republican form of government observing due process, equal protection, equal privileges and immunities without "respect of person"?

(4) Is it lawful for a Judge to consort with an Attorney whose conduct is currently pending before his Court; then to participate in the decision that has the effect, if not overruled, of absolving the Attorney from any challenge of impropriety and not to recuse himself from participation? **Cf. Judicial Canon 4, 13, and 17.** See also **Professional Canon 3.**

(5) Can a Court decide — without citation and without discussion—that the Legislature as embodied in a Legislative Act (Chapter 413 of the Private Acts

of 1933) is supreme over the People as embodied in the State Constitution (The 8th Amendment of 1953) and, in so doing, deny to the People the most precious of all their controls on government—their right to vote? **Cf. Marbury v. Madison,** 1 U. S. 368 at 389, 391.

The Tennessee Supreme Court did.

The Court decided that the 8th Amendment is "not self-executing" **summarily** . . . in violation of its duty to fearlessly support the Constitutional power vis a vis the Legislative power and to apply the fundamental limitations of the former on the latter, **Biggs v. Beeler,** 180 Tenn. 198 at 205 and 219 and **Judicial Canon 3,** in violation of its duty to indicate the reasons for its conclusion that the 8th Amendment is not self-executing, **Judicial Canon 19,** and in violation of its duty to apply general law, **Biggs v. Beeler,** 180 Tenn. 558 at 562 and **Judicial Canon 20.**

The law of Tennessee is:

> "If Courts, to avoid hardships, may disregard and refuse to enforce . . . (constitutional) . . . provisions, then the security of the citizen is imperiled. Then the will, it may be the unbridled will, of the judge, would usurp the place of the Constitution and the laws . . . until all constitutional and legal barriers are destroyed, and none

are secure in their rights. . . . If unwise or hard in their operation, the power that adopted can repeal or amend, and remove the inconvenience." (parenthesis supplied) **Webb v. Carter,** 129 Tenn. 182 at 249.

The 8th Amendment at issue in this case is constituted of two Clauses, a "May" Clause and a "Shall Not" Clause. **Tennessee Constitution, Art. XI, Sec. 9, Par. 9.**

Tennessee law is that each Constitutional Clause shall be construed individually so as not to impair or destroy any other Clause.

". . . with reference to the Constitution . . . . no part (is) so construed as to impair or destroy any other part. Legislative powers enumerated **in one clause** must be defined and exercised with reference to limitations and requirements made **in other clauses."** (parenthesis and emphasis supplied). **Memphis v. Memphis City Bank,** 91 Tenn. 574 at 587. See, in accord, **Shields v. Williams,** 159 Tenn. 349 at 359.

Tennessee law is, by previous interpretation, that the "May" Clause of the 8th Amendment is **"not** self-executing," **Frazer v. Carr,** 210 Tenn. 565 (Not cited by the Court in the case at bar), and that the "Shall Not" Clause of the 8th Amendment is a mandatory inhibition or prohibition Clause, **Webb v.**

**Carter,** 129 Tenn. 182 at 233, 240, 243, and, as such, **is** "self-executing"; **viz.** ". . . an inhibition per se . . . executes itself." **Friedman Brothers v. Mathes,** 55 Tenn. 488 at 498-499.

Tennessee law, considering, in order, the "May" Clause and the "Shall Not" Clause of the 8th Amendment, is:

> "While it is true, in reference to **some provisions** of the Constitution, that they are dormant and quiescent until some statute brings them to life and operation, yet there are **others** which need no legislation to give them effect. **They are to be distinguished** by such as confer **mere discretionary powers** upon the Legislature, and such as are **positive limitations** upon the legislative discretion—such as are . . . **inhibitions per se** . . . This is an inhibition per se, and **executes** itself. (emphasis supplied) **Friedman Brothers v. Mathes,** 55 Tenn. 488 at 498-9. See, **in accord, Yerger v. Raines,** 23 Tenn. 259 at 261-2 and **Johnson City v. Railroad,** 100 Tenn. 138 at 143. See also, **in accord, Cooley** at 170 and Am. Jur. (2d), **Const. Law,** Sections 94 and 100.

Since it is only the "Shall Not" Clause's referendum phrase that is at issue in this case, and since the "Shall Not" Clause is "self-executing," the 8th Amendment applies to the case at bar and, conse-

quently, there can be no consolidations of functions of government by fiat of government officials in Tennessee without submission of the proposed new form of consolidated government, in whole or in part, to the People in a referendum.

Given that the "Shall Not" Clause of the 8th Amendment of 1953 applies to the case at bar, Tennessee law is that all legislative law existing in 1953 (including Chapter 413 of the Private Acts of 1933) and all future legislative law after 1953 are prospectively exhausted of all power to effectuate any or all consolidations of functions of government except by the procedure, manner, or means specified in Amendment 8.

> ". . . the use of the word 'shall' in prescribing the exact and formal procedure . . . excludes the idea that any other order of procedure may be recognized as a compliance with its terms. . . .". **Webb v. Carter,** 129 Tenn. 182 at 205-206.
>
> "Whenever a State Constitution prescribes a particular manner in which power **shall** be executed, it prohibits every other mode of executing such power. On that particular subject, the authority is exhausted by the Constitutional provision. . . . ". (emphasis supplied) **Smith v. Normant,** 13 Tenn. 271 at 272. See, in accord, **Lynn v. Polk,** 76 Tenn. 121 at 168-169 and **Moore v.**

**Love**, 171 Tenn. 682 at 689. See, **in accord**, Cooley, Judge Thomas M., **Constitutional Limitations** (8th ed., 1927) at 139.

Chapter 413 of the Private Acts of 1933, that was relied upon by the Court in the case at bar, was therefore drained of its power in 1953 and could not, after 1953, support any consolidation by contract.

Disregarding all the general fundamental constitutional law, supra, the Tennessee Supreme Court disarmed the people of their political redress by taking away their right to vote. The people now stand, as once before they stood, helpless before the arbitrary power of governing officials to impose whatever form of government that they, and not the people, desire.[8]

[8]The Tennessee Supreme Court cited **Glasgow v. Fox**, 214 Tenn 656 (1964) in its Opinion as: "Thus, it is abundantly clear 'the predominant intent of the **Act** is to provide consolidation of all or substantially all of the governmental functions of county and city governments into one new metropolitan government—'." "**Opinion**, 4 January 1971, p. 6." The Court will please note that this quote concerns the intent of the **Legislature** in the Metro Government **Act**, and **not** the intent of the the **People** in the 8th Amendment to the Tennessee **Constitution**. It, therefore, has no relevance to the issue in the case at bar. Plaintiffs' counsel is joined by Defendants' counsel in affirming its irrelevancy to the issue, for Defendants' counsel, Mr. James Manire; honestly stated, in direct response to a direct question from the Supreme Court on Hearing, that the Metro Government Act has not application to the case at bar. The Court's citation, therefore, tends to obscure, and not to clarify, the central issue in the case; i.e. is the "Shall Not" Clause self-executing or not? The foregoing applies equally to the Tennessee Supreme Court's only other citation in its Opinion, **Metropolitan Government of Nashville and Davidson County v. Poe**, 215 Tenn 53 (1964). Even if the Metro Act did apply, the Court's

**(Footnote Continued on Page 28)**

G. **Conclusion.**

This Court has stated that "Undoubtedly, the right of suffrage is a fundamental matter **in a free and democratic society,** (emphasis supplied) **Reynolds v. Sims,** 377 U. S. 633 at 562 (1963).

The **former** impliedly presupposes the **latter.**

And this Court has been swift to redress the denial or abridgment of the right to vote **in such a society.**

The case at bar does **not** concern the people's **right to vote** in a free and democratic society as such; it concerns the people's **right to** a free and democratic society per se.

The people of Tennessee sought—for reasons discussed hereinbefore among other — to assure their **right to** a free and democratic society by writing into their Constitution in 1953 a reservation of the **right to vote** ON THE FORM OF GOVERNMENT that

**(Footnote Continued)**

citations, **supra,** serve only to interpret the Metro Act and not the **Constitution,** since the legislative intent governs the interpretation of an Act and the people's intent governs the interpretation of the Constitution. Surely the Tennessee Supreme Court does not presume to 'mix' the premises to achieve the anomaly that 'the legislative intent governs the interpretation of the Constitution', yet this is seemingly the thrust of their citations. Notwithstanding, as a reading of their citations will evince, the Metro Act does not apply here because it applies only to consolidations of "all or substantially all" functions of government under the "all" wording of the "any or all" phrase of the 8th Amendment. The case at bar involves the "any" wording.

they believed would most conduce to such a free and democratic society.

That right has been taken away by the Supreme Court of the State of Tennessee "without citation and without discussion," supra, in the case at bar.

When the power of a subordinate branch of government can overthrow the superior constitutional power, is this **the republican form of government in a free and democratic society** that is guaranteed to us by the United States Constitution?

Won't this Honorable Court hear the humble plea of the rejected people of Tennessee?

THEREFORE, Petitioners pray that a Writ of Certiorari issue to review the Opinion and Decree of the Supreme Court of the State of Tennessee in the case at bar.

WILLIAM SLATER HOLLIS
Counsel for Petitioners
P. O. Box 80876
Memphis, Tenn. 38111

## CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed two copies of this Petition for Writ of Certiorari to the Counsel for all parties to the proceedings; namely, Mr. James Manire, City Attorney, and Mr. Brady Bartusch, City Staff Attorney, City Hall; Mr. Cleve Drennon, County Attorney and Mr. Hearn Tidwell, Assistant County Attorney, Shelby County Building; all of Memphis, Tennessee; on this 20 day of May, 1971.

WILLIAM SLATER HOLLIS

## APPENDIX I

IN THE SUPREME COURT OF TENNESSEE

POP POPPENHEIMER, individually and as the legally elected representative of Memphis and Shelby County residents and taxpayers, et al,

APPELLANTS,

VS.

CITY OF MEMPHIS, SHELBY COUNTY QUARTERLY COURT AND SHELBY COUNTY COMMISSIONERS,

APPELLEES

SHELBY EQUITY
HONORABLE ROBERT A. HOFFMAN, CHANCELLOR.

FOR APPELLANTS:
W. SLATER HOLLIS
MEMPHIS, TENNESSEE.

FOR APPELLEES:
JAMES M. MAMIRE
E. BRADY BARTUSCH
JAMES C. BEASLEY AND
HEARN W. TIDWELL,
MEMPHIS, TENNESSEE.

## OPINION

Appellants, complainants below, citizens and taxpayers of Shelby County, filed an original bill in the Chancery Court of that County seeking to enjoin appellees, defendants below, from consummating contracts for consolidation of the hospitals of the City of Memphis and Shelby County and the jointly operated Oakville Memorial Hospital.

The bill alleged the pending consolidation of the hospitals by contract was unconstitutional because it was not submitted by a referendum to the voters of Memphis and Shelby County for their approval as required by the Eighth Amendment to Article 11, Section 9, of the Constitution of Tennessee.

The contract was executed by the City of Memphis and the Board of Commissioners of Shelby County and the Shelby County Quarterly Court on May 12, 1969.

The contract provides the effective date to be July 1, 1969. It provides for the funding of the hospital for the years 1969 through 1972 setting forth the percentage of the annual budget of the hospitals by the respective parties during the fiscal years from July 1, 1969, through June 30, 1973.

During the transition period, all capital improvements to the hospitals are to be shared by the City

and County on the same basis for sharing operation costs. All properties of the City hospitals are to be conveyed to Shelby County on or before July 1, 1972.

The employees of the City hospitals are to become employees of Shelby County on or before July 1, 1972.

The contract, also, provides the annual budget for all the hospitals during the transition period be subject to approval of the governing bodies of the City and County.

The contract provides either party may cancel the contract by giving six months written notice of cancellation during the first two years of the agreement.

Upon the filing of the bill, the Chancellor granted a temporary injunction and set the hearing for July 1, 1969.

Defendants filed motions to dismiss the bill alleging the contract was a legal agreement properly executed under authority of T. C. A. Section 5-113 and Chapter 413, Private Acts of 1933. The motions further alleged the contract was legally drafted and executed under authority of T. C. A. Section 6-3723 and Chapter 189, Private Acts of 1969.

Upon the hearing, the Chancellor dissolved the temporary injunction and set the motions to dismiss the bill for a hearing on September 22, 1969.

On July 7, 1969, complainants filed an amended and supplemental bill for an injunction in which it was alleged the City of Memphis had adopted home rule by a vote of the people in 1963. That Chapter 189, Private Acts of 1969, is unconstitutional because it is an Act private or local in form and effect and violates that part of Article 11, Section 9, of the Constitution which provides: "The general assembly shall act with respect to a home rule municipality only by laws which are general in terms and effect."

The amended and supplemental bill further alleges unless the contract for the consolidation of the City and County hospitals is submitted to the voters of the City and County for ratification the same will result in unconstitutional legislation in violation of Article 1, Section 8, Article 11, Sections 9 and 16 of the Constitution of Tennessee; and the Fourteenth Amendment to the Constitution of the United States.

To the amended and supplemental bill all defendants filed motions to dismiss substantially upon the grounds set out above in the motions to dismiss the original bill.

The Chancellor appointed several prominent Attorneys of the Memphis and Shelby County Bar to file briefs in the matter as Amicus Curiae.

The matter was heard upon the bills, motions to

dismiss, exhibits to the pleadings and briefs of the respective parties and Amicus Curiae.

The Chancellor filed a memorandum opinion in which he properly held the principal issue is whether the home rule amendment to Article 11, Section 9, of the Constitution of Tennessee applies to the consolidation of the hospital facilities of the City of Memphis and Shelby County. He held it did not and dismissed the original, amended and supplemental bills.

We affirm the decree of the Chancellor.

Complainants have appealed and assigned five alleged errors.

The first assignment insists the Chancellor erred in failing to hold the Seventh amendment to Article 11, Section 9, of our constitution applied to Chapter 189, Private Acts of 1969.

We disagree. The Act is permissive legislation authorizing Shelby County by and through its Quarterly Court and Board of Commissioners to enter into a contract with the City of Memphis for the operation, maintenance and control of all the governmental hospitals within Shelby County.

Section 1 of the Act provides:

> "That the County of Shelby be and it is hereby authorized by and through its Quarterly County

Court and Board of Commissioners to enter into contracts with the City of Memphis through its proper authorities for the operation, maintenance and control of the Shelby County Hospital, Oakville Memorial Hospital and the City of Memphis Hospitals."

Section 4 of the Act provides:

"That the Quarterly Court of Shelby County and the Board of Commissioners of Shelby County be and they are hereby authorized by agreement with the Mayor and legislative body of the City of Memphis to create and establish the appointment of, tenure of service, and qualifications of the Memphis and Shelby County Board of Hospital Trustees; such agreement, if made to be evidenced by an ordinance passed by the legislative body of the City of Memphis, the terms of such ordinance shall be embodied in and concurred in by a resolution of the Quarterly Court of Shelby County."

It is clear the Act is not mandatory on the City of Memphis and does not violate the Sixth and Seventh Amendments to Article 11, Section 9, of the Constitution of this State.

Assignments of error two and three assail the action of the Chancellor in holding the provisions of the Eighth Amendment to Article 11, Section 9, of

the Constitution of Tennessee had no application to this case.

The Eighth Amendment to Article 11, Section 9, of the Constitution reads as follows:

> "The General Assembly may provide for the consolidation of any or all of the governmental and corporate functions now or hereafter vested in municipal corporations with the governmental and corporate functions now or hereafter vested in the counties in which such municipal corporations are located; provided such consolidations shall not become effective until submitted to the qualified voters residing within the municipal corporation and in the county outside thereof, and approved by a majority of those voting with the municipal corporation and by a majority of those voting in the county outside the municipal corporation."

The amendment is not self-executing and is implemented by Chapter 120, Public Acts of 1957, codified as T. C. A. Section 6-3701, et seq.

Section 2 of the Act, codified as T. C. A. Section 6-3702, provides, in part:

> "It is hereby declared to be the legislative intent and purpose of this Chapter to provide for the consolidation of all, or substantially all, of the

governmental and corporate functions now or hereafter vested in municipal corporations with the governmental and corporate functions now or hereafter vested in the counties in which such municipal corporations are located, and to provide for the creation of metropolitan governments which may be used to fulfill the unique and urgent needs of modern metropolitan areas."

Furthermore, Section 22 of the Act, codified as T.C.A. Section 6-3723, provides:

"Nothing in this Chapter shall be construed to alter, abridge or abrogate any provision of Sections 5-113 and 49-404 or any other law, practice, custom, or tradition with respect to contractual, cooperative, unilateral or other devices for simplifying or expediting municipal or (and) county government."

T. C. A. Section 5-113 provides:

"The Quarterly County Court of any County and the chief legislative body of any municipality that lies within the boundaries of said county are authorized and empowered to enter into any such agreements, compacts, or contractual relations as may be desirable or necessary for the purpose of permitting said county and said municipality to conduct, operate, or maintain, either jointly or by one (1) agency for the other, de-

sirable and necessary services or functions, under such terms as may be agreed upon by the two (2) agencies."

Thus, it is abundantly clear "the predominant intent of the Act is to provide consolidation of all or substantially all of the governmental and corporate functions of county and city governments into one new metropolitan government - - -." Glasgow vs. Fox, 214 Tenn. 656, 383 S. W. 2d 9 (1964); Metropolitan Government of Nashville and Davidson County vs. Poe, 215 Tenn. 53, 383 S. W. (2d) 265 (1964).

Chapter 413, Private Acts of 1933, which constitutes a part of the charter of the City of Memphis, is an enabling Act which authorizes Shelby County and all municipalities therein to consolidate or operate jointly any or all governmental or corporate activities or functions of the county and municipal corporations.

We conclude, as did the Chancellor, the Eighth Amendment to Article 11, Section 9, of the Constitution cannot have any application to the contract consolidating the hospitals of the City and County.

We will now consider assignment of error five. This assignment insists the Chancellor was in error in failing to find the contract entered into was in violation of the constitutional rights of the people of Memphis and Shelby County under the Fourteenth

Amendment of the Constitution of the United States, Article 1, Section 8, and Article 11, Section 9, to vote on the consolidation of the hospitals.

The citizens of Memphis and Shelby County are taxpayers of Shelby County. The governing bodies of the City and County are elected by the citizens and taxpayers of Memphis and Shelby County.

The operation of the hospitals is one of many of the responsibilities of the government of the City and County.

The Quarterly Court and the Board of Commissioners of Shelby County, as well as the Mayor and City Council of Memphis, are elected by the people. The contract was authorized by the general law of this State.

Both of the governing bodies of the City of Memphis and Shelby County authorized, approved and adopted the contract as representatives of the people. Hence, the people of Memphis and Shelby County have not been denied their vote in violation of the Constitution of this State or of the United States.

There is a motion to strike the fourth assignment of error by appellees on the ground the question is raised in this Court for the first time.

We are of the opinion we must grant the motion

and strike the assignment and exhibits thereto alleged to support same.

The assignment challenges the right of the Chancellor to appoint Amicus Curiae. No objection to this action of the Chancellor appears in the record,

There is attached to petitioners' brief certain exhibits alleged to support the assignment consisting mostly of newspaper clippings which do not appear in the record.

The decree of the Chancellor is affirmed with costs.

CHESTER C. CHATTIN
JUSTICE

DYER, C. J.,
CRESON AND McCANLESS, JJ.,
AND ADAMS, S. J., CONCUR.

## APPENDIX II

IN THE SUPREME COURT OF TENNESSEE

POP POPPENHEIMER, individually and
as the legally elected representative
of Memphis and Shelby County
residents and taxpayers, et al,

APPELLANTS

VS.

CITY OF MEMPHIS, SHELBY COUNTY

QUARTERLY COURT AND SHELBY COUNTY COMMISSIONERS,
SHELBY EQUITY

APPELLEES

HONORABLE ROBERT A. HOFFMAN, CHANCELLOR

## FINAL DECREE

This cause came on to be heard upon the filing of the assignments of error and brief by the Appellants, response thereto by the Appellees, and oral arguments of solicitors for Appellants and Appellees, from all of which it appears to the Court that the assignments of error of Petitioners are without merit and that the Decree of the Chancellor should be affirmed.

It is therefore ORDERED, ADJUDGED AND DECREED that the assignments of error filed by the Appellants herein be and the same are hereby overruled and the Decree of the Chancellor is hereby affirmed for the reasons set forth in the Opinion filed herein on January 4, 1971, said Opinion being incorporated herein by reference.

It is further ORDERED, ADJUDGED AND DECREED that the costs of the cause are adjudged against the Petitioners.

CHESTER C. CHATTIN
Justice

JAMES MANIRE
E. BRADY BARTUSCH
Solicitors for Respondents
City of Memphis

HEARN W. TIDWELL
Solicitor for Respondents
County of Shelby
Solicitor for Petitioners

## APPENDIX III

POP POPPENHEIMER, individually and as the legally elected representative of Memphis and Shelby County residents and taxpayers, et al,

APPELLANTS

VS.

CITY OF MEMPHIS, SHELBY COUNTY QUARTERLY COURT AND SHELBY COUNTY COMMISSIONERS,

APPELLEE

SHELBY EQUITY

## ON PETITION TO REHEAR

Appellants have filed a petition to rehear which makes no new argument, points out no matters overlooked or cites any new and decisive authority which was overlooked by this Court.

Hence, the petition must be denied. Knox vs. Bat-

son, 217 Tenn. 620, 399 S. W. (2d) 765 (1965). See also Rule 32 of this Court.

CHESTER C. CHATTIN
JUSTICE.

DYER, C. J.,
CRESON AND McCANLESS, JJ.,
AND ADAMS, S. J., CONCUR.

**APPENDIX IV.**

**PRESS-SCIMITAR, 15 JANUARY, 1970**

# Overton Land Price Increase Gets Attorney $25,000 Fee

THOMAS R. PREWITT

By CLARK PORTEOUS
Press-Scimitar Staff Writer

City Council today had approved a $25,000 fee for Thomas R. Prewitt, attorney for the Park Commission, in connection with settling the price for 26.4 acres of Overton Park for the East-West expressway.

There was brief discussion of the payment in the Council public meeting yesterday. The vote was 9-1 with Bob James voting "no" and councilmen Lewis Donelson and J. O. Patterson present but not voting.

Council did not discuss the fee in executive session earlier, but the Parks Committee, headed by Downing Pryor, discussed the fee with the park commission and council members knew of it.

The State of Tennessee had offered $1,950,000 for the Overton Park acreage and Prewitt, by negotiating, increased the payment $250,149 to $2,200,149, the council resolution said.

It was stated at the council meeting that Prewitt's fee was less than 10 per cent of the additional money.

Councilman Wyeth Chandler said that for professional services the fee should be set before hand, and council approval obtained then rather than after the work is done.

Donelson said this should be the case, especially when the person to be paid already works for the city. Donelson said extra service was involved, but "when you do it for one you may have to do it for others."

W. T. McAdams was absent when the matter came up.

James said: "The fee is too high for the time put into it."

It was learned that council discussed the fee in a brief closed session in the chairman's office prior to Jan. 1.

Prewitt, a member of Mayor Henry Loeb's unofficial "kitchen cabinet," is paid a $150 monthly retainer fee as attorney for the Park Commission. This compares with the lowest pay for an assistant city attorney of $500 a month.

Prewitt said this case amounted to special employment by the Park Commission, and he gets extra pay for such employment. Prewitt said he worked about a year on the matter. He said he could not say how many hours he put in.

The fee was set by Probate Judge Harry Pierotti, who was chairman of the Park Commission until recently.

The fee was recommended to council by Harry Woodbury, director of public service, and the Park Commission. The park board voted unanimously on the fee in December, Woodbury said. He added that Prewitt had earned the fee.

The fee will be taken from the money received from the Overton Park land sale.

Some at city hall compared the fee with that paid to James E. Irwin, attorney, by former Mayor William B. Ingram late in 1967 for special work done on the proposed purchase of Fox Meadows golf course. City Council, when it came into office in 1968, questioned that transaction, but later approved it.

It was learned that Mayor Loeb objected to the $25,000 fee and had suggested instead that Prewitt's retainer with the Park Commission be raised. Loeb declined comment.

John D. Martin, new chairman of the Park Commission, said he was not on the commission when Prewitt was engaged to do the job, but was when the fee was set. Martin said he believed the fee to be fair. Martin said Pierotti spoke out strongly in favor of it.

## APPENDIX V.
## COMMERCIAL APPEAL, 15 JULY, 1970

### Judge Says Judiciary Unsuited For Politics

Justice George McCanless of the Tennessee Supreme Court yesterday pondered the problems of the judiciary in a political campaign.

"Election of judges shouldn't be based on lottery or a matter of chance. A judge cannot properly make any promises except to work hard and do his duty."

Justice McCanless, a former state attorney general, is faced with colorful Republican opposition Aug. 6 in the person of Judge Charles Galbreath of the State Court of Criminal Appeals.

Justice McCanless made the handshaking rounds in Memphis yesterday accompanied by attorney Thomas Prewitt, whose father, the late Justice Alan Prewitt of Bolivar, was on the high court for 21 years, the last three as chief justice.

The basis of his judicial theory, Justice McCanless said, is that judges are to interpret the law as it is written "and not undertake to legislate."

He said he is disturbed that the average voter pays so little attention to judicial races. "The Democratic process always works better when the people are informed. I would hope that they will consult with attorneys before casting their ballots."

ARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 18 1971
E. ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

~~1435~~ 70-190

POP POPPENHEIMER, Et Al,
PLAINTIFFS-PETITIONERS

v.

CITY OF MEMPHIS AND SHELBY COUNTY
QUARTERLY COURT AND COMMISSIONERS,
DEFENDANTS-RESPONDENTS

---

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

JAMES M. MANIRE
Attorney for Defendant
City of Memphis
125 North Main Street
Memphis, Tennessee 38103

C. CLEVELAND DRENNON
Attorney for Defendant
Shelby County
160 North Main Street
Memphis, Tennessee 38103

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IN THE

# Supreme Court of the United States

POP POPPENHEIMER, Et Al,
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DEFENDANTS-RESPONDENTS

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

This brief is respectfully filed in behalf of the Defendants City of Memphis and Shelby County Quarterly Court and Commissioners in opposition to the petition for writ of certiorari filed hereon.

## STATEMENT OF THE CASE

The Respondents feel, with all deference to the Petitioners, that a statement of the history of this

case is necessary to aid this court in its decision, and that such a statement was succinctly enunciated by the Tennessee Supreme Court in its opinion, beginning on page 32 of the Petition for Writ of Certiorari. The Supreme Court of Tennessee made the following statement:

> "Appellants, complainants below, citizens and taxpayers of Shelby County, filed an original bill in the Chancery Court of that County seeking to enjoin appellees, defendants below, from consummating contracts for consolidation of the hospitals of the City of Memphis and Shelby County and the jointly operated Oakville Memorial Hospital.
>
> The bill alleged the pending consolidation of the hospitals by contract was unconstitutional because it was not submitted by a referendum to the voters of Memphis and Shelby County for their approval as required by the Eighth Amendment to Article 11, Section 9, of the Constitution of Tennessee.
>
> The contract was executed by the City of Memphis and the Board of Commissioners of Shelby County and the Shelby County Quarterly Court on May 12, 1969.
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> The contract provides the effective date to be

July 1, 1969. It provides for the funding of the hospital for the years 1969 through 1972 setting forth the percentage of the annual budget of the hospitals by the respective parties during the fiscal years from July 1, 1969, through June 30, 1973.

During the transition period, all capital improvements to the hospitals are to be shared by the City and County on the same basis for sharing operation costs. All properties of the City hospitals are to be conveyed to Shelby County on or before July 1, 1972.

The employees of the City hospitals are to become employees of Shelby County on or before July 1, 1972.

The contract, also, provides the annual budget for all the hospitals during the transition period be subject to approval of the governing bodies of the City and County.

The contract provides either party may cancel the contract by giving six months written notice of cancellation during the first two years of the agreement.

Upon the filing of the bill, the Chancellor granted

a temporary injunction and set the hearing for July 1, 1969.

Defendants filed motions to dismiss the bill alleging the contract was a legal agreement properly executed under authority of T.C.A. Section 5-113 and Chapter 413, Private Acts of 1933. The motions further alleged the contract was legally drafted and executed under authority of T.C.A. Section 6-3723 and Chapter 189, Private Acts of 1969.

Upon the hearing, the Chancellor dissolved the temporary injunction and set the motions to dismiss the bill for a hearing on September 22, 1969. On July 7, 1969, complainants filed an amended and supplemental bill for an injunction in which it was alleged the City of Memphis had adopted home rule by a vote of the people in 1963. That Chapter 189, Private Acts of 1969, is unconstitutional because it is an Act private and local in form and effect and violates that part of Article 11, Section 9, of the Constitution which provides: 'The general assembly shall act with respect to a home rule municipality only by laws which are general in terms and effect.'

The amended and supplemental bill further alleges unless the contract for the consolidation of

the City and County hospitals is submitted to the voters of the City and County for ratification the same will result in unconstitutional legislation in violation of Article 1, Section 8, Article II, Sections 9 and 16 of the Constitution of Tennessee; and the Fourteenth Amendment to the Constitution of the United States.

To the amended and supplemental bill all defendants filed motions to dismiss substantially upon the grounds set out above in the motions to dismiss the original bill.

The Chancellor appointed several prominent Attorneys of the Memphis and Shelby County Bar to file briefs in the matter as Amicus Curiae.

The matter was heard upon the bills, motions to dismiss, exhibits to the pleadings and briefs of the respective parties and Amicus Curiae.

The Chancellor filed a memorandum opinon in which he properly held the principal issue is whether the home rule amendment to Article 11, Section 9, of the Constitution of Tennessee applies to the consolidation of the hospital facilities of the City of Memphis and Shelby County. He held

it did not and dismissed the original, amended and supplemental bills.

We affirm the decree of the Chancellor."

## OPINION OF THE SUPREME COURT

The Petitioners presented a similar position to the Supreme Court of the State of Tennessee as that which they generally set forth in their Petition for Writ of Certiorari. The Tennessee Supreme Court, in sustaining the action of the Chancellor in dismissing the Petitioners' bill, made the following statements as noted on page 35 et seq. of Petitioner's application for a Writ of Certiorari:

"Complainants have appealed and assigned five alleged errors.

The first assignment insists the Chancellor erred in failing to hold the Seventh amendment to Article 11, Section 9, of our constitution applied to Chapter 189, Private Acts of 1969.

We disagree. The Act is permissive legislation authorizing Shelby County by and through its Quarterly Court and Board of Commissioners to enter into a contract with the City of Memphis for the operation, maintenance and control of all the governmental hospitals within Shelby County.

Section 1 of the Act provides:

> 'That the County of Shelby be and it is hereby authorized by and through its Quarterly County Court and Board of Commissioners to enter into contracts with the City of Memphis through its proper authorities for the operation, maintenance and control of the Shelby County Hospital, Oakville Memorial Hospital and the City of Memphis Hospitals.'

Section 4 of the Act provides:

> 'That the Quarterly Court of Shelby County and the Board of Commissioners of Shelby County be and they are hereby authorized by agreement with the Mayor and legislative body of the City of Memphis to create and establish the appointment of, tenure of service, and qualifications of the Memphis and Shelby County Board of Hospital Trustees; such agreement, if made to be evidenced by an ordinance passed by the legislative body of the City of Memphis, the terms of such ordinance shall be embodied in and concurred in by a resolution of the Quarterly Court of Shelby County.'

It is clear the Act is not mandatory on the City of Memphis and does not violate the Sixth and Seventh Amendments to Article 11, Section 9, of the Constitution of this State.

Assigments of error two and three assail the action of the Chancellor in holding the provisions of the Eighth Amendment to Article 11, Section 9, of the Constitution of Tennessee had no application to this case.

The Eighth Amendment to Article 11, Section 9, of the Constitution reads as follows:

> 'The General Assembly may provide for the consolidation of any or all of the governmental and corporate functions now or hereafter vested in municipal corporations with the governmental and corporate functions now or hereafter vested in the counties in which such municipal corporations are located; provided such consolidations shall not become effective until submitted to the qualified voters residing within the municipal corporation and in the county outside thereof, and approved by a majority of those voting with the municipal corporation and by a majority of those voting in the county outside the municipal corporation.'

The amendment is not self-executing and is implemented by Chapter 120, Public Acts of 1957, codified as T.C.A. Section 6-3701, et seq.

Section 2 of the Act, codified as T.C.A. Section 6-3702, provides, in part:

'It is hereby declared to be the legislative intent and purpose of this Chapter to provide for the consolidation of all, or substantially all, of the governmental and corporate functions now or hereafter vested in municipal corporations with the governmental and corporate functions now or hereafter vested in the counties in which such municipal corporations are located, and to provide for the creation of metropolitan governments which may be used to fulfill the unique and urgent needs of modern metropolitan areas.'

Furthermore, Section 22 of the Act, codified as T.C.A. Section 6-3723, provides:

'Nothing in this Chapter shall be construed to alter, abridge or abrogate any provision of Sections 5-113 and 49-404 or any other law, practice, custom, or tradition with respect to contractual, cooperative, unilateral or other devices for simplifying or expediting municipal or (and) county government.'

T.C.A. Section 5-113 provides:

'The Quarterly County Court of any County and the chief legislative body of any municipality that lies within the boundaries of said county are authorized and empowered to enter into any such agreements, compacts, or contractual

relations as may be desirable or necessary for the purpose of permitting said county and said municipality to conduct, operate, or maintain, either jointly or by one (1) agency for the other, desirable and necessary services or functions, under such terms as may be agreed upon by the two (2) agencies.'

Thus, it is abundantly clear 'the predominant intent of the Act is to provide consolidation of all or substantially all of the governmental and corporate functions of county and city governments into one new metropolitan government . . . .' Glasgow vs. Fox, 214 Tenn. 656, 383 S.W. 2d 9 (1964); Metropolitan Government of Nashville and Davidson County vs. Poe, 215 Tenn. 53, 383 S.W. (2d) 265 (1964).

Chapter 413, Private Acts of 1933, which constitutes a part of the charter of the City of Memphis, is an enabling Act which authorizes Shelby County and all municipalities therein to consolidate or operate jointly any or all governmental or corporate activities or functions of the county and municipal corporations.

We conclude, as did the Chancellor, the Eighth Amendment to Article 11, Section 9, of the Constitution cannot have any application to the con-

tract consolidating the hospitals of the City and County.

We will now consider assignment of error five. This assignment insists the Chancellor was in error in failing to find the contract entered into was in violation of the constitutional rights of the people of Memphis and Shelby County under the Fourteenth Amendment of the Constitution of the United States, Article 1, Section 8, and Article 11, Section 9, to vote on the consolidation of the hospitals.

The citizens of Memphis and Shelby County are taxpayers of Shelby County. The governing bodies of the City and County are elected by the citizens and taxpayers of Memphis and Shelby County.

The operation of the hospitals is one of many of the responsibilities of the government of the City and County.

The Quarterly Court and the Board of Commissioners of Shelby County, as well as the Mayor and City Council of Memphis, are elected by the people. The contract was authorized by the general law of this State.

Both of the governing bodies of the City of Mem-

phis and Shelby County authorized, approved and adopted the contract as representatives of the people. Hence, the people of Memphis and Shelby County have not been denied their vote in violation of the Constitution of this State or of the United States.

There is a motion to strike the fourth assignment of error by appellees on the ground the question is raised in this Court for the first time.

We are of the opinion we must grant the motion and strike the assignment and exhibits thereto alleged to support same.

The assignment challenges the right of the Chancellor to appoint Amicus Curiae. No objection to this action of the Chancellor appears in the record. There is attached to petitioners' brief certain exhibits alleged to support the assignment consisting mostly of newspaper clippings which do not appear in the record.

The decree of the Chancellor is affirmed with costs."

The Tennessee Supreme Court had prior to the case at bar indicated that the Eighth Amendment to Article XI, Section 9 of the Constitution of the State of Tennessee was not self executing. In its decision

in 1962 case of **Frazier v. Carr,** 210 Tenn. 565, 360 S.W. 2d 449 at page 451 the Court said:

> "It will be noticed that the Eighth Amendment is not self executing. Therefore, as a condition precedent to its becoming effective it must be implemented by legislative enactment. It was so implementsd by Chapter 120 of the Public Acts of 1957, Chapter 199, Public Acts of 1961, and by Chapter 408, Private Acts of 1961. The two Public Acts are codified commencing at 6-3701 T.C.A."

Further in its opinion the Court indicated:

> "In 1957 the legislature enacted Public Act Chapter 120, Section 6-3701 et seq., T.C.A. to implement constitutional amendment Number 8 since that Amendment is not self executing."

The Petitioners herein subsequently filed a petition to rehear before the Tennessee Supreme Court, after consideration of which the Court made the following statement:

> "Appellants have filed a petition to rehear which makes no new argument, points out no matters overlooked or cites any new and decisive authority which was overlooked by this Court.
>
> Hence, the petition must be denied. Knox vs. Batson, 217 Tenn. 620, 399 S.W. (2d) 765 (1965). See also Rule 32 of this Court."

Thus, the Defendants rely on the opinion of the Supreme Court of the State of Tennessee, including its denial of the petition to rehear, which succinctly expresses the historical and factual aspects of the case and correctly determines the legal issues involved, and submit same in reply to the Petition for a Writ of Certiorari and the alleged assignments of error contained therein.

## CONCLUSION

It is respectfully submitted that the decision of the Tennessee Supreme Court was eminently correct and that the Petition for Writ of Certiorari does not meet the prerequisites for the granting of a writ of certiorari as set forth by this Honorable Court.

Therefore, Respondents respectfully move the dismissal of the Petition for Writ of Certiorari.

Respectfully submitted,

James M. Manire
E. Brady Bartusch
Attorneys for Defendant City of Memphis
125 North Main Street
Memphis, Tennessee 38103

C. Cleveland Drennon
Hearn Tidwell
Attorneys for Defendant Shelby County
160 North Main Street
Memphis, Tennessee 38103

## CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed three copies of this Brief in Opposition to Petition for Writ of Certiorari to the Attorney for Petitioners, W. Slater Hollis, P. O. Box 80876, Memphis, Tennessee 38111, this 18th day of June, 1971.

James M. Manire

## APPENDIX

Sec. 847. Consolidation and joint operation of governmental functions of the city with Shelby County — Authority granted.

Shelby County and/or all municipal corporations and/or other local governmental agencies located in said county are authorized and empowered to

consolidate or operate jointly any or all governmental or corporate activities or functions of said county and/or municipal corporations and/or other local governmental agencies located therein which may now or hereafter be authorized to operate or conduct, which may be conveniently or advantageously consolidated or operated jointly. (Priv. Acts 1933, ch. 413, Sec. 1)

Sec. 848. Same — Power to enter into contracts.

For the purpose of carrying out the powers and authorities granted by this Act (sections 847 to 850), said Shelby County and/or all municipal corporations and/or other local governmental agencies located therein are expressly authorized and empowered to enter into contract for the purpose of affecting and carrying out any such consolidation and/or joint operation of governmental or corporate activities or functions authorized by this Act. (Priv. Acts 1933, ch. 413, sec. 2)

Sec. 849. Same — Contracts to be executed by governmental bodies.

Contracts authorized by this Act (sections 847 to 850) shall be entered into and executed by and on behalf of Shelby County by either its quarterly county court or by its board of county commissioners, with reference to any governmental or corporate

activities or functions operated, conducted or controlled by either of them, and by and on behalf of municipal corporations and/or other local governmental agencies located in said county by the legislative council or other appropriate governing bodies of such municipal corporations and/or other local governmental agencies. (Priv. Acts 1933, ch. 413, sec. 3)

Sec. 850. Same — Provisions of contracts.

Any and all contracts authorized by the provisions of this Act (sections 847 to 850) may be executed in such form and with such provisions, conditions and limitations, and for such considerations, as may be acceptable to the contracting parties; and it is hereby expressly provided that such contracts may authorize the carrying on within the corporate limits of any such municipal corporation or any governmental or corporate activity or function provided for under the terms of any such contract by or through any agents, employees or other character or agency therein agreed on, whether or not they reside within the corporate limits of such municipal corporation. (Priv. Acts 1933, ch. 413, sec. 4)

# REPLY BRIEF OF THE PETITIONER

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E. ROBERT SEAVER

IN THE

# Supreme Court of The United States

70-190

POP POPPENHEIMER ET AL
PLAINTIFF-PETITIONER

V.

CITY OF MEMPHIS AND SHELBY COUNTY
QUARTERLY COURT AND COMMISSIONERS
DEFENDANT-RESPONDENT

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NO. ~~1782,~~ OCTOBER TERM, 1970

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## PETITIONERS' BRIEF IN RESPONSE TO RESPONDENT'S BRIEF

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W. SLATER HOLLIS
Counsel for Petitioners
P. O. Box 80876
Memphis, Tenn. 38111

IN THE

# Supreme Court of The United States

POP POPPENHEIMER ET AL
PLAINTIFF-PETITIONER

V.

CITY OF MEMPHIS AND SHELBY COUNTY
QUARTERLY COURT AND COMMISSIONERS
DEFENDANT-RESPONDENT

NO. 1732, OCTOBER TERM, 1970

## PETITIONERS' BRIEF IN RESPONSE TO RESPONDENT'S BRIEF

W. SLATER HOLLIS
Counsel for Petitioners
P. O. Box 80876
Memphis, Tenn. 38111

TO THE HONORABLES CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

## REPLY TO RESPONDENT'S BRIEF ON THE SUBSTANTIVE ISSUE OF THE CASE AT BAR

Petitioners respectfully bring to the Court's atten-

tion that Respondents cite only one case in addition to the[redacted] cases cited by the Tennessee Supreme Court; namely, **Frazer v. Carr,** 210 Tenn. 565.

Respondents, however, do **not** state to this Court that, in the one case cited, supra, the "Shall Not" Clause at issue here was **not** at issue there; instead, only the "May" Clause was at issue. The **Frazier** Court was explicit,

> "Attention is at once attracted to the expression in this Amendment, to wit, 'The General Assembly **may provide for . . .**'" (emphasis by italics by the Tennessee Supreme Court), **Frazier v. Carr, supra,** at p. 575. See also **Petition for Writ of Certiorari,** at page 24.

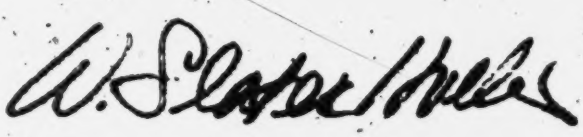
The attempt of Respondents to "generalize" the **Frazer v. Carr** decision to include, not only the "May" Clause at issue before it, but also the "Shall Not" Clause **not** at issue before it, was rejected by the Tennessee Supreme Court itself; which Court, the **Frazer** case having been cited to it by Respondents, would **not** and did **not** cite it as precedent for its decision. See **Opinion.**

## ON THE PROCEDURAL ISSUES OF THE CASE AT BAR

Petitioners respectfully bring to the Court's attention that Respondents only response here was to cite

the Tennessee Court's **Opinions**; which implicitly suggests, it would seem, that Respondents concur that the profession can no longer condone the professional conduct attendant to this case where rights have been infringed upon. See **Exhibit A, infra,** and **Petition for Writ of Certiorari.**

WHEREFORE, Petitioners pray that a Writ of Certiorari issue to review the Opinion and Decree of the Supreme Court of the State of Tennessee in the case at bar.



WILLIAM SLATER HOLLIS

## CERTIFICATE OF SERVICE

We hereby certify that we have this day mailed two copies of this Brief to the Attorneys for all parties to the proceedings; namely, Mr. James Manire, City Attorney, and Mr. Brady Bartusch, Assistant City Attorney, City Hall; Mr. Cleve Drennon, County Attorney, Shelby County Bldg.; Mr. Jack Petree, City Board of Education Attorney, and Ernest Kelly, Jr., Of Counsel, 900 Memphis Bank Bldg.; Mr. Lee Winchester, Jr., Co. Bd. of Educ. Attorney, Suite 3200, 100 N. Main Bldg., all of Memphis, Tennessee, and Mr. David Pack, State Attorney General, Supreme Court Bldg., Nashville, Tenn., this ~~28~~ 29th day of June, 1971.

W. Slater Hollis

**EXHIBIT A**

**THE MEMPHIS PRESS-SCIMITAR**

**February 6, 1971**

# Ex-Justice Clark Tells Lawyers To Clean Up Their Profession

By PAMELA REEVES
United Press International Staff Writer

CHICAGO. — Former U.S. Supreme Court Justice Tom Clark Friday criticized lawyers and courts for failure to report the misdoers in their ranks.

Clark and Edward L. Wright, president of the American Bar Association and a resident of Little Rock, Ark., ranked adequate discipline of lawyers as the No. 1 priority in the profession.

Clark

The two participated in a panel discussion before state bar association presidents at the mid-year meeting of the ABA. The meeting continues through Tuesday.

Clark said only three states — Arkansas, Michigan and Wisconsin — "have had the courage" to cope with lawyer discipline adequately.

He said the prevailing attitude among lawyers and judges is "I don't want to have anything to do with it," if someone in the profession is doing something illegal or unethical.

★ ★ ★

"I HOPE I DON'T step on too many toes," Clark said, "but I think we have to change the whole philosophy of the bar on this subject."

He warned the lawyers, "If you don't do something about the problem, the legislatures are going to — the public is going to."

Wright termed internal profession discipline "the foremost problem of the profession today."

Clark was chairman of a seven-man committee which conducted a three-year study on self-discipline in the law profession.

In a report released last spring and approved unanimously by the ABA's policy-making House of Delegates last summer, the committee said it had found "a scandalous situation that requires the immediate attention of the profession."

The report covered 36 major areas and made recommendations in each of them. It suggested that public and ABA funds be used to set up adequate disciplinary channels which would be formed on statewide bases.

★ ★ ★

SUBSEQUENT TO THE REPORT a Committee on National Coordination of Disciplinary Enforcement was formed under the chairmanship of Henry Pitts, past president of the Illinois Bar Association.

Pitts said his committee has found 15 states are not even studying the problem and apparently are not contemplating doing so. He said, however, "On the whole, there's a mounting realization of the dimensions of this problem."